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requests were presented in the context of market dominance. Nevertheless, the Director gave dispositive weight to *dicta* in the Board's prior precedent to conclude that the Uniform Rail Costing System ("URCS") is to be used for all regulatory purposes, including qualitative market dominance. *Id.* Such statements are clearly *dicta* because the Board was not asked to address the relevance of internal costs to qualitative market dominance in any of those decisions.

In only one decision has the Board ever addressed the relevance of internal costs to market dominance. In Potomac Electric Power Co. v. CSX Transportation, Inc., 2 S.T.B. 290, 294 (1997) ("PEPCO"), the plaintiffs sought to use internal costs to show that a considerably lower rate would still be very profitable for the railroads. The Board denied discovery of internal costs because it does "not use rate-cost relationships as a basis for qualitative market dominance determinations." *Id.* That is not why M&G has requested CSXT's internal costs.

In this proceeding, the effectiveness of intermodal competition is likely to play a prominent role in the determination of market dominance, because all of the issue movements involve the transportation of polyethylene terephthalate ("PET"), which is transported in the form of plastic pellets. PET can move by truck, and does move by truck, in certain circumstances. Furthermore, PET can be transloaded between rail and truck. Therefore, CSXT is likely to allege that intermodal transportation of PET is an effective competitive constraint upon its rail rates to M&G.

Indeed, CSXT already has asserted that intermodal transportation alternatives constitute effective competitive constraints in another rate case that is pending before the Board, in STB Docket No. 42121, that also involves the transportation of plastic pellets. In a "Motion for Expedited Determination of Jurisdiction Over Challenged Rates," filed on October 1, 2010, CSXT alleged that 78 case lanes could be transported by rail carriers other than CSXT to rail-

truck transloading facilities for delivery by truck to the final destination. According to CSXT, this constitutes such clear and compelling evidence that it lacks market dominance that the Board should deviate from the procedural schedule in that case and decide market dominance before the parties submit evidence on rate reasonableness.

Extensive precedent holds that the existence of an intermodal alternative at rates comparable to the challenged rates is not dispositive of effective intermodal competition. Ariz. Pub. Serv. Co. v. United States, 742 F.2d 644, 651 (D.C. Cir. 1984) (“Arizona”) (“[T]he mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure.”); E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., STB Docket No. 42099, slip op. at 7 (served June 27, 2008) (“Even if we were to find that the cost of [an alternative] is similar to the cost of using rail . . . , it does not follow that the threat of [the alternative] is evidence of effective competition.”). An alternative mode’s pricing may be a poor indicator of effective competition because the pricing may merely create an “outer limit” rather than an effective competitive constraint. Id., at 8; FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 718 (2000) (“FMC”) (“[An] alternative does impose an outer limit on the rate that [a carrier] can charge, although [the carrier] can exercise considerable market power before reaching that outer limit.”); Arizona, 742 F.2d at 651 (“At some point the availability of an alternative such as the horse and buggy or even people carrying oil in buckets theoretically prevents railroads from raising their rates beyond an outer bound.”).¹

M&G has requested CSXT’s internal costs in order to prove that transload alternatives are not an effective competitive constraint upon CSXT’s rates. If CSXT is earning substantial


¹ The Director’s decision, at 3, summarily dismisses M&G’s citation to FMC, because the Board did not rely upon internal costing data when it reached these conclusions. But that is beside the point, if the plaintiff never requested such evidence. Here, M&G has both requested this information and demonstrated its relevance.

profits on M&G's traffic at rates that are comparable to higher cost transload operations, that would be highly relevant to determining whether the transload alternative is an effective competitive constraint upon CSXT's rates or merely an "outer limit" below which CSXT can still exercise considerable market power. URCS costs cannot be used for this evaluation. Only CSXT internal costs can be used because these are the costs CSXT uses to set rates and identify profits.

Unlike SAC, which is based upon a hypothetical railroad, qualitative market dominance is based upon real world economic factors. The rail industry, including CSXT, has never claimed that it makes pricing decisions based upon URCS. Indeed, the existence of separate internal cost systems by which railroads make internal business decisions is well known, and railroads have vigorously opposed their production in all regulatory proceedings. See PEPCO. The qualitative market dominance test asks whether there is "effective" competition from other rail carriers or other modes of transportation in the real world. Therefore, it is important to conduct that analysis based upon the costs that a railroad uses in the real world when it decides whether a shipper's alternative transportation option is a true competitive threat. This information, which is not available from any other source, would be valuable to M&G's ability to demonstrate that comparably priced transload alternatives are not effective competitive constraints upon CSXT's pricing.

For the foregoing reasons, M&G respectfully requests that the Board reverse the Director's decision and grant M&G's First Motion to Compel.

Respectfully submitted,



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November 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that this 30th day of November 2010, I served a copy of the foregoing upon Defendants in the following manner and at the addresses below:


Via hand-delivery to:

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Counsel for CSXT

Via first class mail to:

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Jeff Collins, General Manager Mohawk, Adirondack & Northern Railroad Corp. 1 Mill Street, Suite 101 Batavia, NY 14020	William J. Drunsic, President Nashville and Eastern Railroad Corp. 514 Knoxville Avenue Lebanon, TN 37087
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G.R. Abernathy, President Sequatchie Valley Railroad Company P.O. Box 296 Bell Buckle, TN 37020-0296	Paul G. Nichini, President New Hope & Ivyland Railroad 32 West Bridge Street New Hope, PA 18938

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Thomas Burden, General Manager Georgia Woodlands Railroad, LLC 210 Depot Street P.O. Box 549 Washington, GA 30673	



Jeffrey O. Moreno

Exhibit 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

M&G POLYMERS USA, LLC

Complainant,

v.

CSX TRANSPORTATION, INC., ET AL.

Defendant.

Docket No. 42123

**MOTION TO COMPEL
OF M&G POLYMERS USA, LLC**

Pursuant to 49 C.F.R. § 1114.31(a), Complainant M&G Polymers USA, LLC ("M&G"), hereby moves the Surface Transportation Board ("STB" or "Board") to compel CSX Transportation, Inc. ("CSXT") to respond to M&G's "Third Set of Discovery Requests" ("Discovery Requests") in the above-captioned proceeding. CSXT has unjustifiably refused to provide information and data in response to M&G's Discovery Requests. In this Motion, M&G asks the Board to order CSXT to provide responses to its Discovery Requests. Exhibit A contains a copy of CSXT's objections.

I. BACKGROUND

M&G's Discovery Requests consist of two Requests for Production of Documents ("RFP") related to CSXT's internal costs. In RFP No. 163, M&G has requested the following information from CSXT:

Please produce all documents encompassing, referring or relating to any studies or analyses conducted by CSXT since 2006 pertaining to the profitability of the revenue generated by the transportation rates charged by CSXT to M&G for the Issue Movements.

In RFP No. 164, M&G has requested the following information:

Please produce all documents encompassing, referring or relating to any methodology including all computer programs (in both compiled and non-compiled versions); databases; and documentation used by CSXT for internal management purposes to determine its costs of handling the Issue Movements as well as any and all adjustments to any methodology to account for special studies.

CSXT has objected to both Discovery Requests as “not relevant to whether the Challenged Rates are reasonable under the stand-alone cost constraint, or to any other subject properly at issue in this case” See “Defendant’s Responses and Objections to Complainant’s Third Set of Discovery Requests,” attached hereto as Ex. A, pp. 2 and 3. In addition, CSXT has objected to these Requests to the extent they call for production of internal costing data.

M&G has posed these Discovery Requests, not for purposes of stand-alone costs or rate reasonableness, but to elicit critical information that is relevant to CSXT’s market dominance over the issue traffic. This information is necessary to determine the cost advantage that CSXT enjoys over alternative transportation modes. This information, in conjunction with CSXT’s dominant market share, is a relevant indicator of market dominance according to Board precedent. See, FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 718 (2000) (“FMC”).

II. ARGUMENT

A. The Legal Standard for Motions to Compel.

The Board will grant motions to compel discovery that are reasonably drawn. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 548 (1985) (“Guidelines”). The Board’s discovery rules permit “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). These rules grant Complainants broad discovery rights, which follow the policies reflected in the Federal Rules of Civil

Procedure. E.g., Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub No. 1), slip op. at 68-69 (“Our discovery rules follow generally those in the Federal Rules of Civil Procedure”) (served Sept. 5, 2007).

A motion to compel discovery must state, with particularity, the nature and substance of the charges that the petitioner seeks to prove, as well as the basis for the petitioner’s belief in those charges. Guidelines at 548. In addition, “the discovery requested must be reasonably tailored to the particular charges to be proved and reflect the least intrusive means of obtaining the information.” Id. The motion should set forth adequate procedures to protect the confidentiality of the information sought. Id. M&G satisfies each of these factors in this Motion to Compel.

B. CSXT’S Internal Costs Are Relevant To The Issue Of Market Dominance.

As a prerequisite to determining the reasonableness of the challenged rates in this proceeding, the Board must determine whether CSXT possesses market dominance over the issue traffic. 49 U.S.C. § 10707(b) and (c). Market dominance is the “absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” Id. § 10707(a). It has quantitative and qualitative components, of which the qualitative component is relevant here. See E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., STB Docket No. 42099, slip op. at 2 (served June 27, 2008) (“DuPont”). One element of the qualitative analysis is intermodal competition. Mkt. Dominance Determinations & Consideration of Prod. Competition, 365 I.C.C. 118, 131 (1981). An absence of effective intermodal competition exists if the intermodal competition cannot restrain rail rates to a reasonable level. DuPont, at 5.

The effectiveness of intermodal competition is likely to play a prominent role in the determination of market dominance in this proceeding. All of the case lanes involve the

transportation of polyethylene terephthalate ("PET"), which is transported in the form of plastic pellets. PET can move by truck, and does move by truck, in certain circumstances. Furthermore, PET can be transloaded between rail and truck. Therefore, CSXT is likely to allege that intermodal transportation of PET is an effective competitive constraint upon its rail rates to M&G.

Indeed, CSXT already has asserted that intermodal transportation alternatives constitute effective competitive constraints in another rate case that is pending before the Board, in STB Docket No. 42121, that also involves the transportation of plastic pellets, although not PET. In a "Motion for Expedited Determination of Jurisdiction Over Challenged Rates," filed on October 1, 2010, CSXT alleged that 78 case lanes could be transported by rail carriers other than CSXT to rail-truck transloading facilities for delivery by truck to the final destination. According to CSXT, this constitutes such clear and compelling evidence that it lacks market dominance that the Board should deviate from the procedural schedule in that case and decide market dominance before the parties submit evidence on rate reasonableness.

The existence, however, of an intermodal alternative even at rates comparable to the challenged rates does not demonstrate the presence of effective intermodal competition. Ariz. Pub. Serv. Co. v. United States, 742 F.2d 644, 651 (D.C. Cir. 1984) ("Arizona") ("[T]he mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure."). The Board underscored this principle in DuPont by stating that comparable pricing does not indicate effective competition. DuPont, at 7 ("Even if we were to find that the cost of [an alternative] is similar to the cost of using rail . . . , it does not follow that the threat of [the alternative] is evidence of effective competition.") (emphasis in original). An

alternative mode's pricing may be a poor indicator of effective competition because the pricing may merely create an "outer limit" rather than an effective competitive constraint. Id., at 8 (citing FMC, 4 S.T.B. at 718 ("[An] alternative does impose an outer limit on the rate that [a carrier] can charge, although [the carrier] can exercise considerable market power before reaching that outer limit."); Arizona, 742 F.2d at 651 ("At some point the availability of an alternative such as the horse and buggy or even people carrying oil in buckets theoretically prevents railroads from raising their rates beyond an outer bound.")).

Determining whether a rate for an intermodal option is an effective competitive constraint upon CSXT's pricing requires consideration of the relative costs of providing the two transportation alternatives. A rail carrier with a large cost advantage can raise its rate to or, depending on certain non-price advantages, above those of its intermodal alternatives without a loss in market share. In that scenario, an alternative transportation rate that is comparable to, or even below, that of a rail carrier with a dominant market share would not be an effective competitive constraint. See FMC, 4 S.T.B. at 718. M&G has sought discovery of CSXT's internal costs in order to demonstrate that CSXT operates at a large cost advantage relative to any intermodal options that CSXT may contend are effective competitive constraints.

C. Board Precedent Permits Discovery Of CSXT's Internal Costs For The Purpose Of Proving Market Dominance.

In objecting to M&G's Discovery Requests, CSXT incorrectly makes the blanket assertion that Board precedent holds that internal costing system information is not subject to discovery. This assertion, however, is the result of a truncated reading of Board precedent, as illustrated by CSXT's incomplete quotation from Kansas City Power & Light Co. v. Union Pacific Railroad, STB Docket No. 42095 (served Feb. 15, 2006) ("KCPL"). CSXT quotes KCPL for the Board's statement that "it is contrary to Board precedent to require a party to

produce internal management costing information,” but leaves out the rest of the Board’s sentence, which went on to say “because costs in Board proceedings are to be determined using the Board’s Uniform Rail Costing System.” *Id.* at 2. The omitted language is essential, because it emphasizes that the Board’s precedent proscribing the discovery of internal costing system information has largely concerned the use of the information for rate reasonableness purposes, not market dominance.

CSXT further misconstrues the Board’s precedent regarding the discovery of internal costing system information by its citation to Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Railway, 2 S.T.B. 367 (1997) (“APS”). In APS, the plaintiff sought “an explanation of [the carrier’s] internal system for costing movements and how that differs from [the Board’s] Uniform Railroad Costing System.” *Id.* at 371. Keeping with its precedent that internal cost system information is not relevant to rate reasonableness, the Board declined to permit the discovery, stating that “it would not use a carrier’s internal costing system information for any purpose in [its] analysis and decision.” *Id.* at 372. While CSXT seeks to construe this statement as a blanket prohibition on the discovery of internal costing system information, the Board was clearly only determining the relevance of the discovery to its rate reasonableness determination.

The Board’s only denial of a motion to compel internal costing system information on market dominance grounds also is inapposite to M&G’s Discovery Requests. In Potomac Electric Power Co. v. CSX Transportation, Inc., 2 S.T.B. 290, 294 (1997) (“PEPCO”), the Board denied access to CSXT’s internal costing system data, stating that it does “not use rate-cost relationships as a basis for qualitative market dominance determinations.” The plaintiff in PEPCO, however, sought merely to show that its traffic would remain very desirable to the railroad even at a considerably lower rate.

M&G seeks to use CSXT's internal costing system information to show that CSXT's rates, where similar to rates for transportation alternatives, are not "effectively" constrained by those alternatives because CSXT operates at a large cost advantage. The Board has held that the cost of providing a transportation service is a factor in market dominance determinations where the rail carrier and a transportation alternative charged similar rates and the carrier maintained a dominant market share. FMC, 4 S.T.B. at 717-18. M&G's Discovery Requests seek the evidence needed to satisfy that standard.

C. CSXT's Remaining Objections Are Frivolous And Unsupported.

CSXT has no basis for objecting to the disclosure of internal costing system information as being highly sensitive data. The protective order in this proceeding provides adequate protection for this information. When addressing carriers' concerns regarding the protection of internal costing system information, the Board has stated that a protective order was sufficient to mitigate those concerns. CSX Transp., Inc., STB Docket No. 33388, 1997 STB LEXIS 230, at *4 (served Sept. 12, 1997). The serious consequences of violating a protective order are sufficient to deter the disclosure of the internal costing system information. Id. In addition, the Board has held that the mere fact that counsel and consultants of other parties have access to this information, which would be relevant in other matters in which they represent clients, is insufficient to deny disclosure. Id.

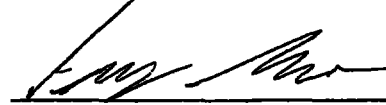
Likewise, CSXT's objections to RFP No. 163 on the basis of ambiguity, undue burden, and being overbroad are improper. The request is not ambiguous; it simply seeks documents addressing the extent to which the revenue that CSXT generates from the rates it charges M&G exceed CSXT's costs of providing that service. In addition, the request is narrowly tailored to the transportation rates at issue and will lead to the discovery of market dominance information related only to such rates.

Finally, other than general assertions, CSXT has not provided any support for its overbroad and burden objections.

III. CONCLUSION

For the foregoing reasons, M&G respectfully requests that the Board order CSXT to respond to M&G's Third Set of Discovery Requests, served October 11, 2010.

Respectfully submitted,



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November 4, 2010

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

M & G POLYMERS USA, LLC	Docket No. NOR 42123
Complainant	
v.	
CSX TRANSPORTATION, INC.	
Defendant	

**DEFENDANT'S RESPONSES AND OBJECTIONS TO COMPLAINANT'S THIRD SET
OF DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, CSX Transportation, Inc. ("CSXT"), through undersigned counsel, submits the following Responses and Objections to Complainant M&G Polymers USA, LLC's ("M&G") Third Set of Discovery Requests.

CSXT incorporates and adopts all of the General Objections set forth in CSXT's Responses and Objections to Complainant's First Requests for Admission, Interrogatories, and Requests for Production of Documents (served August 25, 2010). CSXT's incorporation and adoption of those General Objections includes, but is not limited to, CSXT's objections to the Definitions and Instructions that were set forth in M&G's First Discovery Requests and that M&G incorporates in its Third Set of Discovery Requests. CSXT's objections shall not waive or prejudice any objections that it may later assert.

SPECIFIC OBJECTIONS AND RESPONSE

In addition to its General Objections, below CSXT sets forth Specific Objections and Responses to the Third Set of Discovery Requests. CSXT preserves all of its General Objections set forth above, and none of the following Specific Objections shall waive its General

Objections. Nor shall any of CSXT's specific objections limit the scope, breadth, generality, or applicability of those General Objections.

REQUEST FOR PRODUCTION NO. 163

Please produce all documents encompassing, referring or relating to any studies or analyses conducted by CSXT since 2006 pertaining to the profitability of the revenue generated by the transportation rates charged by CSXT to M&G for the Issue Movements.

Response:

CSXT objects to this Request as repetitive and unduly burdensome in that it overlaps with the information demanded in TPI's Request for Production No. 2. CSXT also objects to the vague, ambiguous, and undefined term "profitability of the revenue." CSXT further objects to Request No. 163 to the extent that TPI's request for "profitability" studies and analyses calls for the production of CSXT's internal costing data. CSXT has already produced revenue data. M&G's request for "profitability" studies, when coupled with its requests for the actual revenue data that CSXT has already produced, constitutes an impermissible attempt to obtain internal railroad costing data that the Board has long held is not subject to discovery in a SAC case. *See, e.g., Kansas City Power & Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42095 (served Feb. 15, 2006) ("it is contrary to Board precedent to require a party to produce internal management costing information"); *Arizona Pub. Serv. Co. v. Atchison, T. & Santa Fe Ry. Co.*, 2 S.T.B. 367, 372 (1997). Moreover, the "the profitability of the revenue generated by the transportation rates charged by CSXT to M&G for the Issue Movements" is not relevant to whether the Challenged Rates are reasonable under the stand-alone cost constraint, or to any other subject properly at issue in this case. CSXT further objects to this Request as overbroad and unduly burdensome in that it is not limited to a reasonable scope of time and instead seeks information since 2006.

REQUEST FOR PRODUCTION NO. 164

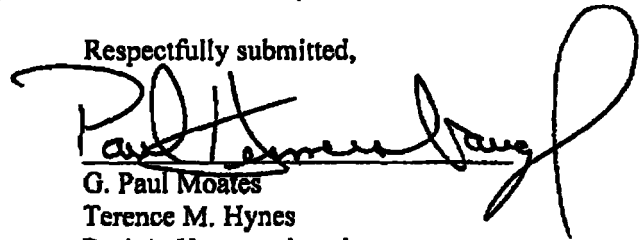
Please produce all documents encompassing, referring or relating to any methodology including all computer programs (in both compiled and non-compiled versions); databases; and documentation used by CSXT for internal management purposes to determine its costs of handling the Issue Movements as well as any and all adjustments to any methodology to account for special studies.

Response:

CSXT objects to this request for production of internal management costing data and programs, which are not relevant to whether the challenged rates are reasonable under the stand-alone cost constraint, or to any other subject properly at issue in this case. Board precedent plainly holds that such information is not subject to discovery. *See, e.g., Kansas City Power & Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42095 (served Feb. 15, 2006) ("it is contrary to Board precedent to require a party to produce internal management costing information"); *Arizona Pub. Serv. Co. v. Atchison, T. & Santa Fe Ry. Co.*, 2 S.T.B. 367, 372 (1997).

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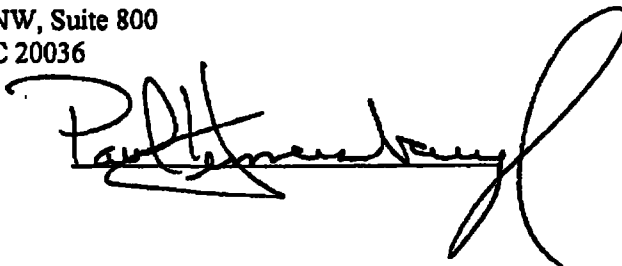
Counsel to CSX Transportation, Inc.

Dated: November 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2010, I caused a copy of the foregoing Responses and Objections to Complainant M&G Polymers USA, LLC's Third Set of Discovery Requests to be served on the following by electronic mail, and by U.S. Mail, postage prepaid:

Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036

A handwritten signature in black ink, appearing to read "Paul H. Hine", written over a horizontal line.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November 2010, a copy of the foregoing Motion to Compel was served by hand delivery to:

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin LLP
1501 K Street, N.W.
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Jeffrey O. Moreno